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No. 87-902

In the Supreme Court of the United States

OCTOBER TERM, 1987

BETHEL BAPTIST CHURCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether mandatory participation in the social security system by church employees violates the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 822 F.2d 1334. The opinion of the district court (Pet. App. 18a-43a) is reported at 629 F. Supp. 1073.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1987. On September 8, 1987, Justice Brennan extended the time to file a petition for a writ of certiorari to and including November 27, 1987, and the petition was filed on November 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Bethel Baptist Church (Bethel) is an independent Baptist Church governed by its members. The other petitioners are various church officers, employees, or parents of children who attend Bethel's school. In operating

that school and various other ministries, Bethel employs church members who are "born again" Christians and who have experienced a religious call to their respective vocations. Although those employees earn less than they could in comparable secular positions, they choose to work for Bethel because of their religious beliefs. Pet. App. 2a-3a.

Bethel's members believe that Scripture requires them to provide for their own financial security, and, if they cannot do so, Bethel must provide for them by means of its own choosing. As a matter of religious principle, Bethel's members oppose any governmental attempt to assume that responsibility to provide for them or to dictate the means by which Bethel discharges its own duty to support its members. In accordance with these beliefs, since 1978 Bethel has maintained its own private social program for the care of its employees, which provides life insurance, disability and medical care coverage, and pension benefits. Pet. App. 3a.

Prior to 1984, the Internal Revenue Code[1] exempted from social security coverage services performed by employees of organizations qualifying for tax-exempt status under Section 501(c)(3) of the Code. See 26 U.S.C. 3121(b)(8)(B). Accordingly, Bethel and its employees were exempt from social security taxes.[2] In 1983, however, Congress amended the Social Security Act and the Internal Revenue Code to extend mandatory social security coverage to the employees of non-profit organizations, including churches, effective January 1, 1984. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 102(b)(2) and (c), 97 Stat. 71. In 1984,

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Tax-exempt organizations had the option of electing to participate in the social security system (see 26 U.S.C. 3121(k)), but Bethel never waived its exemption from coverage.

Congress partially restored the exemption for churches and certain church-controlled organizations, retroactive to January 1, 1984. See Section 2603(b) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 1128-1129. The 1984 amendment, which added Section 3121(w) to the Code, permits churches and church-controlled organizations that are opposed for religious reasons to social insurance to elect irrevocably to exempt themselves from social security taxation. This exemption, however, extends only to the electing church or church-controlled organization itself; its employees then become subject to the self-employment tax (see I.R.C. §§ 1401, 1402(c)(2)(G)), which is currently imposed at a rate equal to the combined employer and employee social security tax rates.[3]

On April 30, 1984, Bethel filed an employer quarterly tax return for the first quarter of 1984, reporting a total social security tax liability of $17,795, which it paid. On May 3, 1984, Bethel filed an administrative claim for refund of those taxes on behalf of itself and its employees. On September 4, 1984, the Internal Revenue Service (IRS) informed Bethel of the opportunity to elect not to be

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[3] The amendment did not disturb two previously existing exemptions from social security tax coverage. Section 1402(e) of the Code prescribes conditions under which ministers, members of religious orders, and Christian Science practitioners opposed as a matter of religious principle to social insurance programs, may obtain exemptions from self-employment tax imposed on income received with respect to services performed in that religious capacity. Section 1402(g) of the Code allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets of (and membership in) certain religious sects, are opposed to accepting the benefits of social insurance. The exemption is conditioned upon the waiver of all social security benefits by such individuals and the determination by the Secretary of Health and Human Services that the sect (1) has the requisite tenets or teachings, (2) has a history of making provision for its dependent members, and (3) has been in existence at all times since December 31, 1950.

subject to the employer portion of the tax and advised it that the deadline for making the election was October 30, 1984. Bethel chose not to make such an election by that time, however, and the IRS thereafter denied Bethel's claim for refund. Pet. App. 5a-6a.

2. Petitioners then brought this suit in the United States District Court for the Middle District of Pennsylvania, asserting that the new statutory scheme violates both the Free Exercise and Establishment Clauses of the First Amendment and also the equal protection component of the Due Process Clause of the Fifth Amendment. The district court, relying primarily on this Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982), granted summary judgment in favor of the government (Pet. App. 18a-43a). The court reasoned that the legislation did not violate the Free Exercise Clause because "[t]he broad public interest in maintaining a sound tax system is of such high order that religious belief in conflict with the payment of taxes affords no basis for resisting the tax" (*id.* at 33a). The court also concluded that the statutory scheme did not foster an excessive entanglement with religion in contravention of the Establishment Clause (*id.* at 40a-41a). Finally, the court rejected petitioners' claim that the extension of social security coverage to church employees, while retaining exemptions for ministers, members of religious orders and Christian Science practitioners under Section 1402(e) of the Code (see note 3, *supra*), violates the equal protection component of the Due Process Clause (Pet. App. 42a).

3. The court of appeals affirmed (Pet. App. 1a-16a). The court rejected petitioners' Free Exercise Clause argument (*id.* at 8a-11a), explaining that this Court's holding in *Lee* that "the government's interest in tax collection outweighs any private religious interest in the nonpayment of taxes" was controlling (*id.* at 9a). With respect to petitioners' Establishment Clause argument, the court explained

that social security taxation does not foster excessive entanglement (*id.* at 11a-13a); instead it "require[s] only the unobtrusive type of governmental inquiries which the state may undertake to ensure that records are kept in accordance with the Fair Labor Standards Act * * * and local fire and zoning regulations" (*id.* at 12a-13a). The court of appeals also rejected petitioners' contention that the new statutory scheme violates equal protection (Pet. App. 13a-15a). The court explained that the limited exceptions of Section 1402(e) and (g) were constitutionally permissible because, in fashioning the exemptions, "Congress sought to accommodate secular, first amendment concerns and attempted reasonably to guarantee the fiscal integrity of a social insurance program" (Pet. App. 15a).

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the social security tax amendments enacted by Congress in 1984 are unconstitutional. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners' primary contention (Pet. 6-14) is that the manner in which the social security tax has been extended to employment by churches violates the Free Exercise Clause of the First Amendment. Arguing that employment by Bethel is a "religious activity" (Pet. 6), petitioners maintain that the requirement that churches either pay social security tax like other employers or elect not to pay that tax, rendering their employees subject to the tax at self-employment rates, burdens "the Church's very means of existence" (Pet. 7). As the court of appeals held, this contention is without merit. Indeed, it is squarely foreclosed by this Court's recent decision in *United States* v. *Lee*, 455 U.S. 252 (1982).

In *Lee*, an Amish employer claimed that it was unconstitutional to require him to pay social security tax, because participation in the social security system violated his religious beliefs. The Court accepted the employer's assertion that the payment of the social security tax was forbidden by the Amish faith and hence agreed that the law "interfere[d] with [his] free exercise rights" (455 U.S. at 257). The Court explained, however, that this conclusion marked only the beginning of the inquiry because a limitation on the free exercise of religion does not violate the First Amendment if it is "essential to accomplish an overriding governmental interest" (*id.* at 257-258). The Court concluded that there existed such an overriding government interest "in assuring mandatory and continuous participation in and contribution to the social security system" (*id.* at 258-259). And the Court found that the plaintiff's religious beliefs could not be accommodated by means of a special exception because permitting "myriad exceptions flowing from a wide variety of religious beliefs" would seriously interfere with the functioning of the tax system (*id.* at 260). The Court concluded (*ibid.*): "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."

The court of appeals correctly held that "*Lee* demonstrates that with respect to the social security tax, the government's interest in tax collection outweighs any private religious interest in the nonpayment of taxes" (Pet. App. 9a), and that *Lee* is controlling here. Petitioners' contention (Pet. 10) that *Lee* is distinguishable is insubstantial. The First Amendment protects the free exercise of religion by every individual; there is no basis for finding that a burden imposed upon that free exercise is constitutional when imposed upon an individual, yet the identical burden is unconstitutional when imposed upon a religious institution like a church. Indeed,

the burden on free exercise was greater in *Lee* than it is here because the social security system does not unavoidably require churches to pay social security tax. Unlike the employer in *Lee*, Bethel could have elected not to be subject to the employer portion of the tax at all, but it chose not to do so.

Petitioners' objection appears to rest in part, not on the fact that social security is contrary to Bethel's religious tenets, but rather on the assertion that the payment of social security tax is a "forced diversion of religiously entrusted funds" (Pet. 10; see also Pet. 7)—either because the church pays the tax directly or because, if it elects to be exempt from the tax, it then would find itself morally obligated to raise the salary of its employees to make up for the increased tax burden on them. That objection is plainly without merit. As this Court explained in *Lee* (455 U.S. at 260), the same objection could be made to the imposition of income tax upon church employees. The First Amendment does not create an exemption from the payment of generally applicable taxes simply because of a religiously-based objection to the use to which the funds may be put by the government.[4] In the words of the court of appeals, "the public interest in the social security system outweighs any private

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[4] Petitioners' reliance on *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), is misplaced. That case involved a license tax aimed specifically at the protected activity of preaching, but the tax involved here extends to all segments of society and applies equally to virtually all employers, employees, and self-employed individuals. The indirect financial effect of the tax asserted by the church—*i.e.*, inducing it to raise its wages to compensate its employees for the added tax—is no greater than the burden imposed on all employers. Even if that wage raise is viewed as necessarily compelled by the tax, it certainly cannot be regarded, as petitioners suggest (Pet. 8-9), as a special tax upon the exercise of religious activity. By the same token, *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970), which involved an Establishment Clause challenge to *granting* tax exemptions to churches, has no bearing on this Free Exercise Clause challenge to the imposition of a tax.

religious interest in non-statutory exemption from social security taxation" (Pet. App. 9a-10a).

2. Petitioners also briefly contend (Pet. 14) that the social security system violates equal protection because Congress has retained some limited exemptions from social security coverage for certain specified taxpayers, namely, ministers, members of religious orders, and Christian Science practitioners who have a conscientious objection to the payment of such taxes (see I.R.C. § 1402(e); see also § 1402(g)). But it is well settled that "[n]either due process nor equal protection imposes * * * any rigid rule of equality of taxation" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)). Congress has wide latitude in making classifications for taxation purposes. See, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585 (1937). As the court of appeals held (Pet. App. 14a), these exemptions, which are restricted to self-employment income derived from religious activities and thus are not directly comparable to the exemption that petitioners seek, do not impermissibly distinguish on a religious basis. Instead, they reflect rational distinctions made on the basis of secular, administrative concerns.

The legislative history shows that Congress enacted these provisions with the valid purpose of accommodating sincere religious beliefs to the extent compatible with the overriding interest in maintaining a comprehensive national social insurance program. See H.R. Rep. 213, 89th Cong., 1st Sess. 101-102 (1965); S. Rep. 1987, 83d Cong., 2d Sess. 9 (1954). And these exemptions have consistently been upheld by the lower courts against the equal protection claim that they are too narrowly drawn. See *Ballinger* v. *Commissioner*, 728 F.2d 1287, 1292-1293 (10th Cir. 1984); *Templeton* v. *Commissioner*, 719 F.2d 1408, 1413-1414 (7th Cir. 1983); *Olsen* v. *Commissioner*, 709 F.2d 278, 283 (4th Cir. 1983); *Jaggard* v. *Commissioner*, 582 F.2d 1189, 1190 (8th Cir.

1978), cert. denied, 440 U.S. 913 (1979); see also *United States* v. *Lee*, 455 U.S. at 260-261 (noting that Section 1402(g) accommodates religious practices in this regard "to the extent compatible with a comprehensive national program"). The fact that Congress has determined against further expansion of these exemptions because that would not "ensure that the social security system would remain financially sound and not be undermined by an excessive number of exemptions" (Pet. App. 15a) does not create an equal protection violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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